Sagau Batu Bala v Zaharah Mustapha Raja Sewa & Anor

HIGH COURT (MIRI) — SUIT NO MYY-22–33/10 OF 2012
STEPHEN CHUNG J
22 MAY 2013

Land Law — Customary land — Right to — Whether arbitrator's determination of rightful claimant to native customary rights over land proper — Whether Lands and Surveys Superintendent's application to refer arbitral award to court and have same set aside flawed — Whether provisions of Arbitration Act 2005 not followed

Following the Sarawak state government's extinguishment of native customary rights ('NCR') over a parcel of land known as Plot A situated in Bario ('the land'), the second and third defendants in the counterclaim, David Labang and Raja Paran, lodged an NCR claim to the land with the Superintendent of Lands and Surveys, Miri ('the Superintendent') pursuant to s 5(3)(b) of the Land Code. The Superintendent rejected their claims causing the matter to be referred to arbitration in accordance with s 212 of the Sarawak Land Code ('Code'). The arbitrator dismissed David Labang's claim and ruled that Raja Paran was the rightful claimant to the land and that he should be compensated by the state government. The compensation awarded by the arbitrator was based on a higher valuation of the land than that made by the superintendent. Meanwhile, the plaintiff in the main suit, Sagau Batu Bala, had also laid an NCR claim to land in Bario and sued the first and second defendants, Zaharah Mustapha Raja Sewa and Mustapha Raja Sewa Abdullah, for, inter alia, trespass. The defendants in turn counterclaimed for a declaration that they were the lawful owners of the land and sought, inter alia, to set aside the arbitrator's decision favouring Raja Paran and for damages against both Sagau Batu Bala and Raja Paran. Dissatisfied with the rejection of his claim by the arbitrator, David Labang applied by way of judicial review for leave to quash the arbitrator's award whilst the superintendent applied under s 42 of the Arbitration Act 2005 ('Act') to have the arbitrator's compensation award set aside and replaced with the valuation of the land as determined by the Superintendent.

Held, setting aside the arbitral award:

(1) The arbitrator's finding that David Labang was not entitled to the land was correct. David Labang could not in 1962 have claimed the land under NCR unless he had complied with the requirements of s 5(1) of the Land Code. From the notes of proceedings and the grounds of the arbitrator David Labang had failed to discharge the onus imposed on him

by s 5(7) of the Land Code to establish that the land was lawfully encumbered by NCR claimed by him (see para 27). A

(2) The arbitrator's finding that Raja Paran was the rightful claimant to the land was illogical or irrational. The notes of proceedings recorded by the arbitrator were incomplete and showed that Raja Paran had failed to discharge the onus imposed upon him by s 5(7) of the Land Code to establish that the land was lawfully encumbered by NCR claimed by him (see paras 31 & 33). B

(3) The superintendent's reference failed to comply with the requirements of s 42 of the Act which made it mandatory for the question of law arising from the award to be framed in a concise manner stating the grounds on which the reference was sought and also the facts leading to the grounds, failing which the relief would not be granted. The Superintendent's application neither set out the question of law to be determined by the High Court nor did it set out the grounds on which the reference was sought. An application to set aside the award of the arbitrator should be made under s 37 and not under s 42 of that Act (see paras 13, 15–16). C D

[Bahasa Malaysia summary E

Berikutan pembatalan oleh Kerajaan Negeri Sarawak terhadap hak-hak adat anak watan ('HAAW) ke atas sebidang tanah yang dikenali sebagai Plot A yang terletak di Bario ('tanah'), defendan-defendan kedua dan ketiga dalam tuntutan balas, David Labang dan Raja Paran, membuat tuntutan HAAW kepada tanah dengan Penguasa Tanah dan Ukur, Miri ('Penguasa') berikutan s 5(3)(b) Kanun Tanah Sarawak ('Kanun'). Penguasa menolak tuntutan mereka menyebabkan perkara dirujuk kepada timbangtara berikutan s 212 Kanun. Penimbangtara menolak tuntutan David Labang dan memerintahkan bahawa Raja Paran adalah penuntut yang sah kepada tanah tersebut dan dia patut dipampaskan oleh kerajaan negeri. Pampasan diawardkan oleh penimbangtara adalah berdasarkan nilai tanah yang lebih tinggi daripada yang dibuat oleh Penguasa. Sementara itu, plaintif dalam tindakan utama, Sagau Batu Bala, juga membuat tuntutan HAAW kepada tanah di Bario dan menyaman defendan-defendan pertama dan kedua, Zaharah Mustapha Raja Sewa dan Mustapha Raja Sewa Abdullah, untuk, antara lain, pencerobohan. Defendan-defendan sebaliknya menuntut balas untuk perisytiharan bahawa mereka adalah pemilik-pemilik tanah yang sah dan memohon, antara lain, mengetepikan keputusan penimbangtara yang memihak Raja Paran dan untuk ganti rugi terhadap kedua-dua Sagau Batu Bala dan Raja Paran. Tidak puas hati dengan penolakan tuntutannya oleh penimbangtara, David Labang memohon melalui semakan kehakiman untuk izin membatalkan award penimbangtara sementara Penguasa memohon di bawah s 42 Akta Timbang Tara 2005 ('Akta') F G H I

untuk award pampasan penimbangtara diketepikan dan diganti dengan penilaian tanah seperti yang ditentukan oleh penguasa.

Diputuskan, mengetepikan award timbang tara:

(1) Dapatan penimbangtara bahawa David Labang tidak berhak kepada tanah adalah betul. David Labang tidak dapat pada tahun 1962 menuntut tanah di bawah HAAW kecuali dia mematuhi dengan keperluan s 5(1) Kanun. Daripada nota-nota prosiding dan alasan-alasan penimbangtara, David Labang gagal untuk melaksanakan tanggungjawab yang dikenakan ke atasnya oleh s 5(7) Kanun untuk membuktikan bahawa tanah tersebut adalah dengan sah dibebani oleh HAAW yang dituntut olehnya (lihat perenggan 27).

(2) Dapatan penimbangtara yang Raja Paran adalah penuntut yang sah kepada tanah tersebut adalah tidak logik atau rasional. Nota-nota prosiding yang direkodkan oleh penimbangtara adalah tidak lengkap dan menunjukkan bahawa Raja Paran gagal untuk melaksanakan tanggungjawab yang dikenakan ke atasnya oleh s 5(7) Kanun untuk membuktikan bahawa tanah tersebut adalah dengan sah dibebani oleh HAAW yang dituntut olehnya (lihat perenggan 31 & 33).

(3) Rujukan penguasa gagal mematuhi dengan keperluan s 42 Akta yang mana membuatkannya mandatori untuk persoalan undang-undang berbangkit daripada award untuk dirangka dalam cara ringkas lagi padat menyatakan alasan-alasan atas mana rujukan dipohon dan juga fakta yang membawa kepada alasan-alasan tersebut, jika gagal relief tidak akan dibenarkan. Permohonan penguasa tidak menetapkan persoalan undang-undang untuk ditentukan oleh Mahkamah Tinggi juga ia tidak menetapkan alasan-alasan atas mana rujukan dipohon. Permohonan untuk mengetepikan award penimbangtara patut di buat di bawah s 37 dan bukan di bawah s 42 Akta (lihat perenggan 13, 15–16).]

Notes

For cases on right to customary land, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3220–3222.

Cases referred to

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428, SC (refd)

Government of India, The v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (refd)

Haji Laugan Tarki Bin Mohd Noor v Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85, SC (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401, FC (refd)

Maimunah Deraman v Majlis Perbandaran Kemaman [2010] MLJU 1711; [2011] 9 CLJ 689, HC (refd)

Sanlaiman Sdn Bhd v Kerajaan Malaysia [2013] 3 MLJ 755; [2013] 2 AMR 523, HC (refd)
Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 36(1), 37, 42, 42(2)
Sarawak Land Code (Cap 81) ss 5(1), (2), (3)(b), (4)(a), (7), 212, 212(1), (3)
Subordinate Courts Act 1948 s 69(a)

Pauline Sagau (Sagau, Raja & Co) in MYY-22–33/10 of 2012 for the plaintiff.
Shankar Ram (Thomas, Shankar Ram & Co) by way of counterclaim for the first and second plaintiffs.
Shankar Ram (Thomas, Shankar Ram & Co) in MYY-22–33/10 of 2012 for first and second defendants.
Pauline Sagau (Sagau, Raja & Co) by way of counterclaim for the first and third defendants.
SH Lim (Jaini Robert & Lau) by way of counterclaim for the second defendant.
Marjanah Adenan (SAG Chambers) by way of counterclaim for the fourth and fifth defendants.
Mohd Taufik (FAG Chambers) by way of counterclaim for the sixth and seventh defendants.
SH Lim (Jaini Robert & Lau) in MYY-13 JR-1/12 of 2012 for the applicant.
Marjanah Adenan (State Attorney General's Chambers) in OS-MYY-24–2/1 of 2013 for the applicant.
Pauline Sagau (Sagau, Raja & Co) in MYY-13 JR-1/12 of 2012 for the first respondent.
Marjanah Adenan (State Attorney General's Chambers) in MYY-13 JR-1/12 of 2012 for the second respondent.
Pauline Sagau (Sagau, Raja & Co) in OS-MYY-24–2/1 of 2013 for the respondent.
Leslie Linton (Battenberg & Talma) by way of counterclaim for the proposed intervenor.

Stephen Chung J:

[1] By a land (Extinguishment of Native Customary Rights) (No 110) 2002 Direction dated 26 September 2002 published in the Sarawak Government *Gazette* on 17 October 2002 vide *Gazette* Notification No 3602, the Minister for Planning and Resource Management made an order that native customary rights ('NCR') over a parcel of land known as Plot A situated at Bario ceased to subsist and the land would revert back to the government for public purpose and any person having any lawful claim to NCR over the land should within 60 days submit his claim to the Superintendent, Land and Survey Department, Miri.

[2] Two persons, David Labang and Raja Paran, claimed the parcel of land pursuant to s 5(3)(b) of the Land Code. The superintendent of land and survey investigated their claims and rejected their claims on the basis that the parcel of land was state land. Under s 5(4)(a), both of them being dissatisfied with the decision of the superintendent had required that the matter be referred to arbitration in accordance with s 212 of the Land Code.

[3] The brief facts were contained in the 'Brief Summary of Dispute Referred to Arbitration' prepared by the superintendent under s 212(1) of the Land Code. The superintendent had referred the matter to arbitration in Arbitration No MR/ARB/LC/05/2003 which was heard by a sessions court judge who was appointed as the arbitrator under s 212 of the Land Code.

[4] The parcel of land was subsequently described as Lot 68 Block 14 Bario Land District and the superintendent valued the land at RM4,959, based on a valuation of the land at RM6,000 per hectare. The arbitrator made a finding that Raja Paran was the rightful claimant of the land and that the state government should compensate him RM19,836, based on a valuation of RM24,000 per hectare determined by the arbitrator.

[5] There are three matters (ie Suit MYY-22–33/10 of 2012, MYY-13 JR-1/12 of 2012 and OS-MYY-24–2/1 of 2013) heard together before this court:

(a) Suit No 22–33/10 of 2012

(i) in this suit, there are several applications before the court;

(ii) in the writ and statement of claim, the plaintiff claimed a parcel of NCR land at Bario described as Pak Puek which he claimed to be part of the family's NCR land at 'Dakah Sinah Kayung', Bario. The plaintiff sued the first and second defendants including for trespass to his land, for an injunction to restrain the defendants from trespassing to his land and for damages. In this suit, the plaintiff did not specifically claimed Lot 68 Block 14 Bario Land District as being part of his land at Pak Pueh or at Dakah Sinah Kayung to belong to him;

(iii) David Labang and Raja Paran both claimed Lot 68 Block 14 Bario Land District which the first and second defendants asserted to be part of Dakah Sinah Kayung and was claimed by the plaintiff and the first and second defendants;

(iv) in the defence and counterclaim, the first and second defendants have by way of the counterclaim sued the plaintiff, David Labang, Raja Paran, the superintendent, the state government, the Arbitration Tribunal and the Government of Malaysia. The first and

second defendants have sought a declaration that they are the lawful owners of the land between Pak Pueh and the new Bario Airport; a declaration that the plaintiff had presented a false claim in this suit and in falsely supporting Raja Paran to claim Lot 68 Block 14 being part of Dakah Sinah Kayung; a declaration that the decision in the arbitration in favour of Raja Paran was null and void, be set aside and cannot bind the first and second defendants in this suit and for damages against the plaintiff and Raja Paran;

(v) in encl 6, the first and second defendants applied that the plaintiff's writ and statement of claim be struck out and that the time limited for filing of the defence and counterclaim be extended;

(vi) in encl 10, Laju Balang asserted that the land claimed by the plaintiff and the first and second defendants is communal land belonging to the residents and inhabitants of Kampung Bario Asal Lambaa, Bario. Laju Balang claimed that he, being a resident of this *kampong*, has an interest in the land, the subject matter in this suit, and applied to intervene and be made as a party as the eighth defendant to the defence and counterclaim in this suit;

(vii) in encl 16, the plaintiff applied that the appearance and the defence and counterclaim be struck out, that encl 6 be dismissed and judgment be entered against the first defendant;

(viii) in encl 20, the first and second defendants applied that leave be granted to them that the appearance and defence and counterclaim filed and served on the plaintiff do stand proper and be allowed in this suit; and

(ix) in encl 26, the plaintiff applied to amend his reply to the defence and to amend his defence to the counterclaim;

(b) MYY-13JR-1/12 of 2012

(i) David Labang has filed an application for judicial review of the decision of the arbitrator. He claimed Lot 68 Block 14 Bario Land District to belong to him and has applied that leave be granted to him to apply for an order of certiorari to remove the decision of the Arbitral Tribunal for it to be quashed;

(ii) David Labang claimed that the arbitrator had erred as follows:

(A) the Arbitral Tribunal recognised and accepted the fact that the mass migration of the Kelabit people from other villages near the Malaysia Indonesia border into Bario for security reasons in 1963 and that they were given land under the Kelabit

customs of 'Matun Tanaq' by the Bario Lembaaq Land Committee 1963 but to farm and to live only with no ownership;

(B) the Arbitral Tribunal recognised that 'Matun Tanaq' existed, was practiced during 1963 and that the practice did not give the land permanently to the Kelabit people who migrated to Bario Lembaaq in 1963;

(C) the Arbitral Tribunal ruled that there was no evidence that the practice of 'Matun Tanaq' had conferred land ownership;

(D) the Arbitral Tribunal ruled that the applicant had migrated to an area in which there were people of Bario Asal Lembaaq, when in fact the disputed land was virgin jungle when cleared by the late Tepu Buang;

(E) the Arbitral Tribunal recognised and accepted Raja Paran as the claimant of the several parcels of land situate at Arur Menalan, Buduk Labatuh, Arur 10 Telal, Arur Tukil, Ba'a Singgalih, Tana Dakah Sinah Katung based on a 'Pengesahan Tanah Temuda Asal mendiang Penghulu Lawai Besara dated 17.2.1996';

(F) the Arbitral Tribunal has no jurisdiction and or ought to decline jurisdiction to hear and decide the ownership of the disputed land, which should have been referred to the native courts; and

(G) the Arbitral Tribunal ought to have confined its proceedings and findings to the quantum of compensation payable, not the ownership of the disputed land;

(c) OS-MYY-24–2/1 of 2013.
The superintendent has applied to refer the arbitrator's decision to the court on a point of law under s 42 of the Arbitration Act 2005.

[6] I shall now deal with the application for judicial review and the application for reference under s 42 of the Arbitration Act 2005 ('AA 2005').

[7] The facts showed that David Labang and Raja Paran had claimed Plot A under NCR but their claims were rejected by the superintendent on the ground that Plot A was state land. Both of them being dissatisfied with the decision had required the matter to be referred to arbitration.

[8] Section 5(4)(a) of the Land Code requires that any person who is dissatisfied with the decision of the superintendent may within 21 days from the date of receipt of the decision by notice in writing sets out the ground that

(a) his claim to NCR has been rejected or not recognised by the superintendent; (b) the allocation of land over which such rights are to be exercised, is inadequate or inequitable; or (c) that the amount or apportionment of compensation is inadequate, unfair or unreasonable. Both of them had by notice in writing addressed to the superintendent that their claim to NCR to Plot A had been rejected and that the matter be referred to arbitration.

[9] Section 212(3) provides that such dispute or matter shall be determined in like manner and with like results, for all intents and purposes but with any necessary modifications as if there had been a reference to a single arbitrator by consent of all parties, within the meaning and for the purposes of the Arbitration Act 1952.

[10] The facts showed that the matter had been decided in the arbitration referred to and that the arbitrator had made a finding that Raja Paran was the rightful claimant of Plot A and that the state government should compensate him RM19,836.

[11] Section 36(1) of the AA 2005 provided that an award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties unless the award is varied or set aside by the High Court.

[12] The superintendent did not challenge the jurisdiction of the arbitrator to decide the matter referred to arbitration pursuant to s 212 of the Land Code. The superintendent also did not challenge the findings of the arbitrator that Raja Paran was the claimant of Plot A. The superintendent however was not satisfied with the valuation and the quantum of the compensation awarded to Raja Paran. The superintendent had pursuant to s 42 of the AA 2005 applied that certain questions of law arising out of the award be referred to the High Court to be determined.

[13] The originating summons filed by the superintendent applied that 'on the hearing of the application by the applicant for the determination of the court on the point of the decision of the Honourable Sessions Court Judge, sitting as an arbitrator on the 4th day of December, 2012'. The OS did not set out the question of law to be determined by the High Court nor did it set out the grounds on which the reference was sought: (see s 42(2) of the AA 2005).

[14] Paragraph 5 of the affidavit in support annexed to the OS stated as follows:

The Applicant seeks to refer the Arbitrator's decision to this Honourable Court on the point of law under s 42 of the AA 2005 or alternatively under the inherent jurisdiction of this Honourable Court that:

(a) the Arbitration Ruling (award on Quantum) made by the learned Arbitrator, Tuan Awang Kerisnada Bin Awang Mahmud (a Session Court Judge on the 4.12.2012 be set aside and the award of the Superintendent of RM4,959.00 be maintained.

(b) Such further and other reliefs as may be just and equitable; and

(c) costs of and incident to this application be awarded to the Applicant.

[15] The reference to the High Court under the OS and affidavit in support made pursuant to s 42 of the Arbitration Act 2005 did not set out or identify the question of law to be determined by the High Court. Instead, in para 5 of the affidavit in support, the application stated that the arbitration ruling be set aside and the award of the superintendent of RM4,959 be maintained. An application to set aside the award of the arbitrator must be made under s 37 of the AA 2005 and not under s 42 of the AA 2005. This OS application was specifically intituled under s 42 of the AA 2005.

[16] Section 42 of the AA 2005 makes it mandatory for the question of law to be framed. It is a requirement to state the question of law arising from the award in a concise manner and state the grounds on which the reference is sought. Such a question of law cannot simply be said to arise out of the arbitration generally, but must arise out of the award. In addition, the facts leading to the grounds must also be stated, failing which the relief will not be granted. The intitulement to s 42 of the AA 2005 in the OS only is not sufficient: *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83, *Maimunah Deraman v Majlis Perbandaran Kemaman* [2010] MLJU 1711; [2011] 9 CLJ 689. The applicant has failed to comply with the requirements of s 42 of the AA 2005.

[17] In respect of the application for judicial review, where there is an appeal provision in the relevant statute which an aggrieved person can take advantage of, the court should be slow that leave for an order of certiorari be granted. The court has a discretion to issue an order of certiorari if it can be shown that there is a lack of jurisdiction or that there is a blatant failure to perform some statutory duty or there is a breach of natural justice. The underlying principle is that the jurisdiction of the High Court to grant an order of certiorari is supervisory in character and is exercisable over all inferior tribunals: *Haji Laugan Tarki Bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85.

[18] David Labang has applied for certiorari to remove the decision of the

Arbitral Tribunal for it to be quashed under his application for judicial review. He had previously referred the matter to arbitration which was heard and determined under AA 2005.

[19] There are provisions in this Act for recourse against the award made by the arbitrator including for an application to the High Court to set aside the award inter alia on the grounds that the arbitration agreement was not valid under the laws of Malaysia or that the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration or that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia or that the award was in conflict with the public policy of Malaysia or there is a breach of the rules of natural justice during the arbitral proceedings or in connection with the making of the award or to refer any question of law arising out of the award to the High Court.

[20] In this case, although David Labang was a party to the arbitration and being dissatisfied with the award of the arbitral tribunal, he did not apply to set aside the award on any of the grounds set out in s 37 of the AA 2005. Nor did he refer any question of law arising out of the award under s 42 of the AA 2005 in particular, during or after the arbitration, that the sessions court judge sitting as an arbitrator had no jurisdiction to determine the ownership of the parcel of land in dispute pursuant to s 69(a) of the Subordinate Courts Act 1948 (as amended). Instead, he applied for judicial review of the award to quash the decision of the arbitrator that the arbitrator had erred, on the grounds which he had set out in his application for the judicial review.

[21] In the arbitration referred to, the sessions court judge sitting as the arbitrator did not exercise jurisdiction and powers pursuant to the Subordinate Courts Act 1948. He was not sitting nor hearing the matter as a sessions court judge. He was appointed the arbitrator under s 212 of the Land Code and exercised jurisdiction and powers as the arbitrator pursuant to the provisions in the Land Code and AA 2005. The superintendent made a finding that Plot A was state land and rejected the claims of David Labang and Raja Paran. Both David Labang and Raja Paran had agreed to refer the matter to arbitration pursuant to s 5(4)(a) of the Land Code. The specific question referred to arbitration was whether the claimants had failed to discharge the onus imposed on them by s 5(7) of the Land Code to establish that the said parcel of land was lawfully encumbered by native customary rights claimed by them. Therefore s 69(a) of the Subordinate Courts Act 1948 was not applicable to the arbitration and did not apply to limit the jurisdiction and powers of the sessions court judge sitting as the arbitrator to decide the claims to the parcel of land in the arbitration.

[22] Further, assuming that the arbitrator was sitting as the sessions court

judge, s 69(a) of the Subordinate Courts Act 1948 provides for two exceptions to the jurisdiction of a sessions court judge that is, a sessions court shall have jurisdiction to hear and determine any action or suit for the recovery of immovable property and a sessions court may adjudicate the dispute on title to immovable property with consent of the parties. Both the claimants and the superintendent had consented to the dispute to the parcel of land to be adjudicated by the arbitrator in the arbitration. There is no merit on this ground of contention.

[23] It is settled law that an arbitrator's award is final, binding and conclusive and can only be challenged in exceptional circumstances. Even if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary, that in itself would not be sufficient to warrant the setting aside of the award. The power to set aside an award under the Act can only be exercised where the arbitrator has misconducted himself or the award has been improperly procured. Whether an award has been improperly procured depends on the issues or the questions that have been referred to the arbitrator. Where in deciding a dispute referred to him, the arbitrator has also to determine a question of law that becomes material to his decision in the dispute, interference by the court is only possible if an error appears on the face of the award: *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401.

[24] Where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'. However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award'. Even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed. Discretion still lies with the court as to whether to respect the award of the arbitral tribunal or to reverse it: *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441.

[25] In the arbitration, the notes of proceedings recorded the testimony of three witnesses only, namely David Labang, Raja Paran and Dr Roland Matu. The respondent also called three witnesses namely Mr Khushairy, Mr Unus Tambi and a valuer who was not named in the notes of proceedings. The notes of proceedings did not show that they were sworn or gave testimony in the arbitration. The notes of proceedings did not record their testimony. However, their testimony were referred to in the grounds of the arbitrator in his award.

[26] The facts showed that David Labang, a Kelabit, was born in Kampong Pak Main, Bario, in 1940. In 1962, during the Indonesian confrontation, he

together with many Kelabit families migrated to Kampong Padang Pasir, Bario for security reasons. He claimed this parcel of land under NCR.

[27] Section 5(1) of the Land Code provides that as from 1 January 1958, native customary rights may be created in accordance with the native customary law of the community concerned by any of the methods specified in sub-s (2), if a permit is obtained under s 10, upon interior area land. David Labang could not in 1962 claimed this parcel of land under NCR unless he complied with the requirements of s 5(1) of the Land Code. From the notes of proceedings and the grounds of the arbitrator, David Labang had failed to discharge the onus imposed on him by s 5(7) of the Land Code to establish that the said parcel of land was lawfully encumbered by NCR claimed by him. The findings of the arbitration that David Labang was not entitled to this parcel of land was correct.

[28] In the arbitration, Raja Paran @ Paul Pusu Lutu claimed that he had inherited several parcels of NCR Land including Plot A from his grandfather *penghulu* Lawai Besara pursuant to a *pengesahan tanah temuda asal mendiang penghulu Lawai Besara* dated 17 February 1996.

[29] Raja Paran called Dr Roland Matu, a medical doctor, as his witness to support his claim to this parcel of land under NCR. Raja Paran is the uncle of Dr Matu. His testimony was self-serving. Dr Matu gave evidence on the history of the Kelabit and their NCR land in Bario. It must be noted that the notes of proceedings of the arbitration proceedings were very brief. The notes of proceedings did not record the testimony of Dr Matu in full although the arbitrator had in his grounds in his award had referred to the testimony of Dr Matu extensively. If his testimony was in a witness statement or affidavit, it was not marked as exhibit in the notes of proceedings.

[30] The *pengesahan tanah temuda asal mendiang penghulu Lawai Besara* was not signed by *penghulu* Lawai Besara nor by Raja Paran. It was signed by TK Tama Saging and *penghulu* Ngimat Ayu. Both of them were not called to testify on the authenticity nor to the truths of the contents of this document. This document was hearsay and not admissible. It could not be used to establish the claim of Raja Paran to this parcel of land.

[31] The notes of proceedings recorded by the arbitrator were not complete. Therefore the findings of the arbitrator that Raja Paran was the claimant of this parcel of land was illogical or irrational: *Sanlaiman Sdn Bhd v Kerajaan Malaysia* [2013] 3 MLJ 755; [2013] 2 AMR 523.

[32] If a decision of an arbitrator is tainted with illegality, it is always open for challenge. On the face of the award, the arbitrator has proceeded illegally by deciding on evidence which was not admissible and there was a breach of natural justice. There is an error in law and there are grounds for setting aside the award: *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, *The Government of India v Cairn Energy India Pty Ltd & Anor*.

[33] From the notes of proceedings, Raja Paran had failed to discharge the onus imposed on him by s 5(7) of the Land Code to establish that the said parcel of land was lawfully encumbered by NCR claimed by him. The arbitrator had erred in making the finding that Raja Paran was the claimant of Plot A.

[34] For the reasons given, the award is set aside. Each party in MYY-13JR-1/12 of 2012 and OS-MYY-24–2/1 of 2013 to pay their own costs.

[35] From the pleadings filed in Suit MYY-22–33/10 of 2012, there are issues of fact and law which should go for trial. Enclosure 6 is dismissed. Similarly, encl 16 is dismissed.

[36] In encl 20, time is extended to the first and second defendants to file and serve their appearance and defence and counterclaim on the plaintiff which they have already filed and that the same do stand as their pleadings in this suit. In encl 26, the plaintiff is given leave to amend and serve his reply to the defence and to amend his defence to the counterclaim within 14 days from this date and the first and second defendants to file any subsequent pleadings to the amended reply and amended defence to the counterclaim in accordance to the Rules.

[37] In view of the court's decision to set aside the award, the proposed intervenor is given time to consider whether he wishes to be added as a party to the suit as the eighth defendant to the defence and counterclaim. Similarly, the parties should consider whether the second to the seventh defendants should be made or be struck out as a party to this suit by way of the counterclaim since the award has been set aside. Costs to be in the cause in respect of all applications filed in this suit.

Arbitral award set aside.

Reported by Ashok Kumar